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The False Dichotomy Between Theory and Skills Training: Why Good Lawyers Need to Pay Attention to Theory

Michael Vitiello*

I. INTRODUCTION

In recent years, some commentators have singled out theoretical legal scholarship as a major problem with legal education.¹ To hear some folks talk, law professors who approach the law from a theoretical perspective disserve their students.² This criticism comes both from within and outside the academy. Some practice-oriented faculty members mock their theoretical colleagues.³ Some members of the media have unthinkingly picked up on that mantra.⁴

Criticizing legal scholarship is hardly new. As long ago as 1936, for example, Yale Law Professor Fred Rodell identified two problems with legal scholarship: “One is its style. The other is its content.”⁵ More recently, prominent federal appellate Judge Harry T. Edwards published a number of articles critiquing much legal scholarship as unhelpful to the bench and the bar.⁶ Similar attacks on legal scholarship are not hard to find. Chief Justice John Roberts joined the chorus when he observed: “Pick up a copy of any law review . . . and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which . . . isn’t of much help to the bar.”⁷

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1. See, e.g., Jill Switzer, *Old Lady Lawyer: Effective Lawyering is More Than Just Knowing the Law*, ABOVE THE LAW (July 13, 2016, 10:44 AM), <http://abovethelaw.com/2016/07/old-lady-lawyer-effective-lawyering-is-more-than-just-knowing-the-law/> (on file with *The University of the Pacific Law Review*) (explaining that theoretical understanding is only one of twenty-six identified “effectiveness factors” that determine a young attorney’s competency on the job; most of these factors are labeled “non-classroom competencies” and are acquired through practice-oriented courses).

2. See, e.g., *id.*

3. See, e.g., *id.* (“While classroom smarts may get a student law review membership, Order of the Coif honors, and other law school distinctions . . . there is an array of other competencies that are just as, if not more, important.”).

4. See, e.g., Katherine Hobson, *Law Schools Work to Make Students More Employable*, US NEWS (Mar. 11, 2014), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2014/03/11/law-schools-work-to-make-students-more-employable> (on file with *The University of the Pacific Law Review*) (“[L]aw schools are also reconsidering what they need to be imparting. Many schools have been shifting attention to “soft” skills like leadership and teamwork. . .”).

5. Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936).

6. E.g., Harry T. Edwards, *Another Look at Professor Rodell’s Goodbye to Law Reviews Essay*, 100 VA. L. REV. 1483 (2014).

7. Kenneth Jost, *Roberts’ Ill-Informed Attack on Legal Scholarship*, JOST ON JUSTICE (July 19, 2011, 10:56 AM), <http://jostonjustice.blogspot.com/2011/07/roberts-ill-informed-attack-on-legal.html> (on file with *The University of the Pacific Law Review*) (cited in Harry T. Edwards, *Essays, Another Look at Professor Rodell’s Goodbye to Law Reviews*, 100 VA. L. REV. 1483, 1488 n.22 (2014)). When the counsel for the plaintiff in *McDonald v. Chicago*, 561 U.S. 742 (2010), urged the Court to overrule the *Slaughterhouse Cases*, Justice

One can find critics within the legal academy as well. For example, Professor Kenneth Lasson described some legal scholarship as “patronizing and pompous patois” and “unintelligible gibberish.”⁸ Similar criticism makes its way into the media as well. In one of a number of articles that he wrote criticizing legal education, New York Times writer David Segal wrote snidely about my colleague Jay Mootz as follows: “Professors are rewarded for chin-stroking scholarship, like law review articles with titles like ‘A Future Foretold: Neo-Aristotelean Praise of Postmodern Legal Theory.’”⁹ Some professors, often skills professors or clinicians, distinguish themselves from “podium” or “traditional” professors by emphasizing that they teach real skills—something their theoretical colleagues do not and cannot.¹⁰ On some campuses, faculties are deeply divided over the relevance of theory to the practice of law.¹¹

Throughout 40 years of teaching, I have heard some colleagues make derogatory comments about the irrelevance of theory. I have always found the dichotomy between skills and theory to be overblown and often misleading. I should be clear: some legal scholarship is not well written and some theoretical scholarship is not much help to anyone—except perhaps to those reviewing a professor for tenure.¹² And of course, the same might be said about scholarship aimed at practitioners. The focus of this paper is on why the dichotomy between theory and practical training is a false one. Specifically, I borrow two exercises from simulation books that I wrote and use those examples to demonstrate how

Scalia asked why counsel would ask the Court “to overrule 150, 140 years of prior law, when you can reach your result under substantive due [process][?]” Reflecting his skepticism about legal scholarship, Justice Scalia added, “I mean, you know, unless you’re bucking for a – a place on some law school faculty.” Transcript of Oral Argument at 6–7, *McDonald v. Chicago*, 561 U.S. 742 (2010) (No. 08-1521).

8. Kenneth Lasson, Commentary, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 943 (1990) (cited in Edwards, *supra* note 7, at 1488 n.21).

9. David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011), available at http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?_r=0 (on file with *The University of the Pacific Law Review*).

10. See, e.g., Desiree Moore, *Skills Learned in Law School that Actually Translate into an Effective Legal Practice*, A.B.A., <http://www.americanbar.org/publications/tyl/topics/professional-development/skills-learned-law-school-actually-translate-effective-legal-practice.html> (last visited Aug. 12, 2016) (on file with *The University of the Pacific Law Review*) (“A law school education is a necessary but insufficient foundation for a legal career . . . success in a legal career certainly does not turn on these skills.”). Professor Moore teaches advanced motion writing and legal writing part-time at the Loyola University Chicago School of Law and is an associate dispute resolution attorney at a firm in Chicago. *Part-time Faculty*, LOY. UNIV. CHI., <http://luc.edu/law/parttime/mooredesiree.shtml> (last visited Aug. 12, 2016) (on file with *The University of the Pacific Law Review*).

11. Compare Ken Gormley, *A Response to ‘Dr. No’*, THE PENNSYLVANIA LAWYER 24 (Jan. 2012), available at [http://webpace.ship.edu/SBLichtman/documents/Pro-Con%20on%20Law%20School%20\(PA%20Lawyer\).pdf](http://webpace.ship.edu/SBLichtman/documents/Pro-Con%20on%20Law%20School%20(PA%20Lawyer).pdf) (on file with *The University of the Pacific Law Review*) (“Turning first year into a trade school, like a plumber’s workshop filled with pipe-wrenches and toolboxes, without the academic/analytical component would send legal education back to the Dark Ages.”), with Switzer, *supra* note 1 (“While classroom smarts may get a student law review membership, Order of the Coif honors, and other law school distinctions . . . there is an array of other competencies that are just as, if not more, important.”)

12. Lasson, *supra* note 8, at 927, 936.

practicing lawyers need to understand theory to make competent arguments. The first example is from criminal law and involves theories of punishment.¹³ Lest readers believe that I chose low hanging fruit, I use a second example from civil procedure and the pleading requirements for a complaint filed in federal court.¹⁴

II. THE PHILOSOPHY OF PUNISHMENT

Not long ago, I gave a presentation at a conference on teaching skills and integrating experiential teaching exercises into the traditional classroom. By way of introduction, one of the organizers made a sharp distinction between teaching skills (a good thing) and teaching theory (in context, seemingly a bad thing). Perhaps I was overly sensitive on the subject, but for several years, I bristled when I have read critiques of American law schools as places where we teach meaningless theory at the expense of practical training. As David Segal wrote in the *New York Times*, the legal academy has emphasized “the theoretical over the useful,” and classes “are often overstuffed with antiquated distinctions.”¹⁵

As I began my presentation, I made clear that it argued a contrary point: that theory matters. And I designed my presentation to show audience members one such example. I borrowed heavily from an exercise that Professor Emily Hughes and I included in our Bridge to Practice book, *Criminal Law Simulations*.¹⁶ We modeled the simulation in our book on the facts of *Lockyer v. Andrade*,¹⁷ a case in which the trial court sentenced the defendant to a term of 50 years to life for two acts of petty theft under California’s Three Strikes law.¹⁸ That we used a real case is important, as developed below.¹⁹

The simulation problem includes a probation report that develops the offender’s personal history. Readers familiar with the criminal justice system will recognize common aspects of the offender’s background: a destructive family life; a stint in foster care; a long history of mostly petty offenses; a stint in the military; periods of incarceration; periods of probation ended with violations of probation; and drug addiction with unsuccessful efforts at getting clean.²⁰ In

13. MICHAEL VITIELLO & EMILY HUGHES, CRIMINAL LAW SIMULATIONS 1–12 (2015).

14. MICHAEL VITIELLO, CIVIL PROCEDURE SIMULATIONS 76–95 (2012).

15. Segal, *supra* note 9.

16. I have included the material that I used at the conference as an appendix to this article.

17. 538 U.S. 63 (2003).

18. CAL. PENAL CODE § 667 (West 2016) (in 2012, California voters approved Proposition 36, which limited the three strikes law so that the third felony has to be at least a serious one as defined in California Penal Code sections 1192.7(c) and 1192.8(a); thus, the statute would no longer be applicable in this case).

19. *Infra* Part II.

20. See, e.g., *Rompilla v. Beard*, 545 U.S. 374, 376 (2005) (defendant had prior convictions, brain damage, and resultant mental illness from fetal alcohol syndrome, and often abused alcohol); *Perry v. Lynaugh*, 492 U.S. 302, 308–09 (1989) (defendant had an “abused childhood” and suffered from mental disease); *Strickland v. Washington*, 466 U.S. 668, 672 (1984) (defendant had previously committed burglaries and was under “extreme stress caused by his inability to support his family” during commission of the charged crimes).

addition, the offender developed a morphine addiction while he was in the military.²¹ Also included is a recommendation from the probation officer. The assignment includes sentencing options under the hypothetical Penal Code (modeled on California's law). The sentencing judge has the option of striking prior felonies and treating the charges as misdemeanors, in which case the sentence could be up to six months in jail.²² At the other extreme, the judge could treat both misdemeanors as felonies—under the governing law, a petty theft-with-a-prior-theft may be treated as a felony—and then sentence the offender to two consecutive minimum terms of 25 years to life.²³ Thus, as in *Andrade*, the judge could sentence the offender to 50 years to life.²⁴

The assignment also includes a statutory provision, borrowed from California law, setting out the objectives that the sentencing judge should attempt to achieve in setting a term of imprisonment.²⁵ Readers familiar with criminal law will recognize the usual suspects (punishment, specific and general deterrence, and incapacitation) along with a few other goals, including restitution and equality among similarly situated offenders. Finally, the assignment explains that the judge for whom students are working wants a recommendation of an appropriate sentence and a justification for that recommendation.

This simulation evolved out of my experience as a criminal law professor. Like many criminal law professors, I find the subject to be of great interest, in part because of the philosophical questions embedded within so much doctrine. Most modern criminal law casebooks begin with a chapter on purposes of punishment and appropriate sentences. For example, two of the leading books I have used, Dressler and Garvey's *Cases and Materials on Criminal Law*²⁶ and Kadish, Schulhofer, Steiker, and Barkow's *Criminal Law and Its Processes: Cases and Materials*,²⁷ include excerpts from several philosophers and scholars about why we punish and how much punishment is appropriate. Students often struggled with the material; some clearly doubted the utility of philosophy. After all, some students claimed that they wanted to be prosecutors or public defenders and could see little use for theory.

The idea for the simulation germinated further when Charles Clark, the Chief Judge of the United States Court of Appeals for the Fifth Circuit, appointed me as counsel for Ricky Terrebonne, a prisoner in Louisiana's state prison.²⁸ When

21. See, e.g., *Webster v. Chappell*, No. 93-306 2014 U.S. Dist. LEXIS 77583, at *100-03 (E.D. Cal. June 4, 2014) (petitioner developed a morphine addiction during his service in the Vietnam War).

22. PENAL CODE § 667(f)(2).

23. PENAL CODE §§ 666, 667.

24. *Lockyer v. Andrade*, 538 U.S. 63, 68 (2003).

25. CAL. R. CT. 4.410(a).

26. JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* (6th ed. 2012).

27. SANFORD H. KADISH, STEPHEN J. SCHULHOFER, CAROL S. STEIKER & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* (9th ed. 2012).

28. *Terrebonne v. Butler*, 848 F.2d 500 (5th Cir. 1988).

he was twenty-one years old and addicted to heroin, Terrebonne arranged a drug buy for two undercover agents in exchange for three bindles of heroin.²⁹ As a result, he received a true life sentence under Louisiana's draconian drug law.³⁰ The case posed the question whether a true life sentence was grossly disproportionate in violation of the Eighth Amendment prohibition against cruel and unusual punishment.³¹ In researching the relevant case law, I realized that philosophical concerns about why we punish were relevant to the legal issue before the court.

By the time I began working on the Bridge to Practice chapter, I had been writing about California's Three Strikes law, raising doubts about its efficacy by referencing the underlying justifications of punishment.³² The Supreme Court had decided *Andrade*³³ and *Ewing v. California*,³⁴ 5–4 decisions upholding extreme sentences imposed under California's Three Strikes law. *Andrade*'s facts proved ideal for posing hard questions about society's justifications for prison sentences.³⁵

To make that point, read the simulation exercise in the appendix and consider the kinds of arguments one might make to justify a particular sentence. Many students justify the death penalty in homicide cases by referencing the simple retributive idea that one must forfeit a life for a life.³⁶ In the simulation, one can explore how that principle of equivalency works. Few students want to hold on to the literal application of the equivalency principle. Compelling the hypothetical defendant to return the stolen DVDs seems inadequate.³⁷ Most students believe that society needs to impose a greater punishment on a thief than the mere return of the property.

29. *Id.* at 501.

30. LA. STAT. ANN. § 40:966 (2016) (in 2009, the law was changed from life imprisonment to anywhere between five and fifty years of hard labor); *Terrebonne*, 848 F.2d at 507.

31. U.S. CONST. amend. XIII; *Terrebonne*, 848 F.2d at 502.

32. See, e.g., Michael Vitiello, *California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?*, 37 U.C. DAVIS L. REV. 1025 (2004); Michael Vitiello, *Reforming Three Strikes' Excesses*, 82 WASH. U. L. Q. 1 (2004); Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395 (1997).

33. 538 U.S. 63 (2003).

34. 538 U.S. 11 (2003).

35. *Lockyer v. Andrade*, 538 U.S. 63, 66 (2003). The cases presented the Court with different issues. *Andrade* arose under the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, and 28 U.S.C.S. § 2241. As a result, counsel for *Andrade* had to argue that the state court decision denying relief was an unreasonable application of clearly established Supreme Court precedent. The five-justice majority found that the controlling case law was not sufficiently well-established. *Id.* at 69–70. *Ewing* came to the Court on the writ of certiorari from the denial of *Ewing*'s claim in the state court system on direct appeal. Thus, that case posed the question whether his sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment. A deeply divided Court found that his sentence did not do so. *Ewing*, 538 U.S. at 30–31.

36. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 333 n.41 (1972) ("The Code of Hammurabi is one of the first known laws to have recognized the concept of an 'eye for an eye,' and consequently to have accepted death as an appropriate punishment for homicide.").

37. See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 52–54 (6th ed. 2012).

What about general deterrence in the simulation exercise? The simulation allows exploration of a number of issues relating to deterrence. A central issue is whether the threat of severe punishment deters. Empirical studies suggest that the certainty of punishment is far more important to deterring crime than is the severity of punishment.³⁸ This leads to an inquiry about resource allocation: if certainty of punishment is more important than severity, does incarcerating the hypothetical defendant for 50 years to life make sense?³⁹ Absent unlimited resources, society is making a choice between prison space and law enforcement.⁴⁰

Proponents of California's Three Strikes law justified its passage as a way to incapacitate high-risk offenders.⁴¹ (That rationale expanded shortly after its passage because incapacitation did not seem to be a sufficient explanation for what proponents claimed was its immediate success.)⁴² The simulation exercise allows discussion of that justification as well—the facts are set up to suggest that the hypothetical defendant failed drug treatment in the past, and as a result, he may be a continuing risk to society. As such, prison, even a long prison term, may be necessary for specific deterrence. Similarly, incapacitation may be the only way to protect society. These facts invite additional questions.

Utilitarian theory is empirical; punishment is a form of harm, justified only if, on balance, it produces greater social good.⁴³ Is it necessary to warehouse the hypothetical defendant for 50 years to protect society? The example allows a discussion of studies that suggest offenders commit fewer crimes as they age, a fact that is especially true for violent offenders.⁴⁴ One can also quantify the cost of 50 years in a prison. In California, for example, the annual cost for an offender is more than \$70,000, increasing as offenders age when they are likely to need more healthcare.⁴⁵ Harder to quantify is the human cost to the offender (and

38. See, e.g., Daniel S. Nagin & Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats Into a Model of General Deterrence: Theory and Evidence*, 39 CRIMINOLOGY 865, 873 (2001) (“[T]he disutility of crime increases with . . . the certainty of punishment.”)

39. Michael Vitiello, *Reforming California Sentencing Practice and Policy: Are We There Yet?*, 46 MCGEORGE L. REV. 685, 689 (2014); see FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY 94–96 (2001).

40. See ZIMRING, HAWKINS & KAMIN, *supra* note 39, at 17–18.

41. *Id.* at 3–7.

42. See *id.* at 221–22.

43. See generally JOHN STUART MILL & JEREMY BENTHAM, UTILITARIANISM AND OTHER ESSAYS (Alan Ryan ed., 1987).

44. Vitiello, *California's Three Strikes and We're Out*, *supra* note 32, at 1084–85; see also Christine Herrman et al., *Report of the Vera Institute of Justice to the Tennessee Governor's Task Force on Sentencing and Recidivism*, VERA INST. OF JUST. 31 (June 6, 2015), available at <http://archive.vera.org/sites/default/files/resources/downloads/tennessee-governors-task-force-sentencing-corrections-vera-report.pdf> (on file with *The University of the Pacific Law Review*).

45. *How Much Does It Cost to Incarcerate an Inmate?*, LEG. ANALYST'S OFF. http://www.lao.ca.gov/PolicyAreas/CJ/6_cj_inmatecost (last visited Aug. 21, 2016) (on file with *The University of the Pacific Law Review*).

perhaps his family).⁴⁶ Balanced against that is the cost of the offender's future criminal conduct, a speculative figure at best. One measure of that cost is the nature of the hypothetical offender's conduct in the simulation exercise. He is a petty thief, guilty of shoplifting several DVDs. That seems like a trivial sum.⁴⁷ On the same side of the ledger is the cost to the store associated with preventing shoplifting. Again, from a utilitarian perspective, which way does the balance shift? How much should taxpayers spend to protect store owners from shoplifting? Are store owners able to prevent crime more efficiently by putting security measures in place?⁴⁸

To this point, you can see that easy answers are not likely to work well. At a minimum, the retributivist and utilitarian justifications may—as they often do—point in different directions.⁴⁹ So do arguments based on the need for incapacitation.⁵⁰

The hypothetical statute requires additional inquiries before a judge can impose a sentence. Here, early detection by store employees prevented the loss. One can explore how incarceration is often flatly inconsistent with restitution. Offenders in prison are seldom in a position to pay for the harm caused by their criminal activity.⁵¹

Also relevant under the statute is ensuring the sentence is similar to other offenders similarly situated. Facts in the simulation allow students to focus on one of the most important debates about punishment over the past 40 plus years. Are offender characteristics relevant,⁵² or should the sentencing court look only to the nature of the offense?⁵³

I included a number of offender characteristics that students may focus on. For example, how important should it be that an offender served in the United States Army? How important is a disastrous family history or failed drug treatment in the past? Focusing on facts like those allows a discussion of the

46. See, e.g., *Who Pays? The True Cost of Incarceration on Families*, ELLA BAKER CTR. FOR HUM. RTS., <http://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf> (last visited Aug. 21, 2016) (on file with *The University of the Pacific Law Review*).

47. *Lockyer v. Andrade*, 538 U.S. 63, 66–67 (2003) (the value of all of the DVDs totaled \$153.54).

48. See Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L. J. 315, 316, 321 (1984).

49. DRESSLER, *supra* note 37, at 14–22.

50. See generally Norval Morris, *The Case for Intermediate Punishment*, 2 FED. PRISONS J. 11 (1991); Norval Morris & Marc Miller, *Predictions of Dangerousness*, 6 CRIME & JUST. 1 (1985).

51. See Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty*, PRISON POL'Y INITIATIVE (July 9, 2015), <http://www.prisonpolicy.org/reports/income.html> (on file with *The University of the Pacific Law Review*).

52. Vitiello, *California's Three Strikes and We're Out*, *supra* note 32, at 1062, 1064; Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1028, 1047, 1051 (1991). See also MODEL PENAL CODE § 6B.06 (AM. LAW INST., Tentative Draft No. 4, 2016) (“[T]he personal characteristics of offenders may be included as considerations within the guidelines when indicative of circumstances of hardship, deprivation, vulnerability, or handicap, but only as grounds to reduce the severity of sentences that would otherwise be recommended.”).

53. Vitiello, *Reconsidering Rehabilitation*, *supra* note 52, at 1051.

continuing debate among scholars, sentencing commissions, and legislators about the meaning of treating similarly situated offenders in a similar manner. Much of the emphasis in the 1970s, the era when many states abandoned indeterminate sentences, was on the need to treat offenders the same when they committed similar offenses.⁵⁴ By comparison, rehabilitation and indeterminate sentencing focused on the offender's capacity for reform.⁵⁵ Focusing on offender characteristics makes sense from a number of perspectives. Society does not need to incarcerate an offender for social protection if he is amenable to rehabilitation.⁵⁶ An offender's personal history may reduce his culpability—for example, a person who grew up in an abusive setting is arguably less culpable than a person who grew up without such impairment.⁵⁷ But the abused person may be harder to rehabilitate. The ongoing debate about offender characteristics demonstrates how determining sentences based on offender characteristics may result in racial discrimination.⁵⁸ For example, white offenders may attain higher educational levels than minorities and may have more intact families to provide support.⁵⁹ Attention to future dangerousness (often the reason for considering offender characteristics) raises concerns as well.⁶⁰ Predicting future criminal conduct is speculative;⁶¹ in addition, relying on potential conduct is punishing someone for something that he may well not do.⁶²

Ignoring offender characteristics has some advantages. It allows a judge to compare sentences to assure that they are comparable among offenders committing the same crime.⁶³ But it also leads to a great deal of unnecessary expense. If sentencing guidelines or a sentencing court relies on good data to determine the future dangerousness of individual offenders, society avoids significant prison costs.⁶⁴ Offenders can reenter the work force and may be able to reunite with their families.⁶⁵

Cycle back to the hypothetical state penal code in the simulation. It instructs the court to focus on multiple factors to assess an appropriate sentence. At some

54. *Id.* at 1012–13, 1015.

55. *Id.* at 1016–17, 1053–54.

56. *See id.* at 1034–35, 1036 n.186.

57. *Id.* at 1026, 1028–29.

58. *See id.* at 1052.

59. *Id.* at 1052; *see also id.* at 1028 n.124 (explaining how the Federal Sentencing Guidelines specifically exclude from consideration education and family ties, among other factors).

60. *Id.* at 1052 n. 275.

61. *Id.* at 1036; *see also* Nathan James, *Risk and Needs Assessment in the Criminal Justice System*, CONG. RESEARCH SERV. 1–2 (Oct. 13, 2015), <https://www.fas.org/sgp/crs/misc/R44087.pdf> (on file with the *University of the Pacific Law Review*).

62. *See* Vitiello, *Can We Return to Rationality?*, *supra* note 32, at 428 n.125.

63. Vitiello, *Reconsidering Rehabilitation*, *supra* note 52, at 1028.

64. *See* Vitiello, *Are We There Yet?*, *supra* note 39, at 689–90 n.41; Vitiello, *Reconsidering Rehabilitation*, *supra* note 52, at 1052–53.

65. *See* Vitiello, *Are We There Yet?*, *supra* note 39, at 700–01.

level, that is intuitively appealing because one is not limited to a simplistic retributive formula for assessing punishment.⁶⁶ One can argue for a longer sentence, perhaps, in light of the need for deterrence. But at the end of the day, focusing on multiple justifications for punishment leaves the court with little guidance.⁶⁷

Given the competing sentencing aims available in the simulation, can one justify the longest penalties, here 50 years to life? That leads to yet another discussion. Many prominent scholars have argued that society may have many legitimate sentencing aims, but that proportionality works as an outer limit on an appropriate sentence.⁶⁸

By this time in the simulation, students should recognize that they have been arguing about purposes of punishment. Not only that, but at least in the casebooks I have used, students are now ready to turn to cases where the Supreme Court has weighed in on all of this. For example, Dressler and Garvey's casebook includes *Coker v. Georgia*⁶⁹ and *Ewing v. California*⁷⁰ in a section on proportionality.⁷¹

Anyone familiar with the Supreme Court's death penalty case law recognizes that it has adopted a form of retributive punishment.⁷² Only where an offender has taken a life (with perhaps some narrow exceptions) may the offender be executed.⁷³ Thus, a state is not free to impose the death penalty merely because such a severe punishment may deter others from committing similar crimes.⁷⁴

66. See discussion *supra* Part II.

67. See, e.g., DRESSLER & GARVEY, *supra* note 26, at 51–61 (documenting the controversy surrounding *People v. Du*, No. BA037738 (Cal. 1991), where the trial judge sentenced the defendant to a total of ten years for voluntary manslaughter and use of a gun in the commission of a felony, but then suspended the sentence and placed the defendant on probation in consideration of California's sentencing objectives).

68. MODEL PENAL CODE § 1.02(2) cmts. a, b (AM. LAW INST., Tentative Draft No. 4, 2016) (describing how the revisions "continue the Code's endorsement of utilitarian crime-reductive purposes, including offender rehabilitation and the incapacitation of dangerous offenders, but incorporate[] meaningful proportionality limitations not envisioned in the original Code.") See also DRESSLER, *supra* note 37, at 49–65; Morris, *The Case for Intermediate Punishment*, *supra* note 50, at 13 ("Proportionality in punishments requires that punishments be fashioned within a limit of what is deserved (that is, they must not be excessive) and they must be attuned to the moral and social circumstances of the offender.")

69. 433 U.S. 584 (1977).

70. 538 U.S. 11 (2003).

71. DRESSLER & GARVEY, *supra* note 26, at 69–91.

72. DRESSLER, *supra* note 37, at 56–59 (describing the Court's reasoning in both *Coker v. Georgia* and *Kennedy v. Louisiana*, as "principally emphasiz[ing] the retributive-based *lex talionis* concept.")

73. *Coker*, 433 U.S. at 600 (finding the death penalty to constitute disproportional punishment for conviction of rape of an adult woman); *Kennedy v. Louisiana*, 554 U.S. 407, 446 (2008) (same for a conviction of child rape).

74. See *Coker*, 433 U.S. at 619 (Burger, C.J., dissenting) (arguing against the majority that "[i]t is, after all, not irrational—nor constitutionally impermissible—for a legislature to make the penalty more severe than the criminal act it punishes in the hope it would deter wrongdoing.")

That is not the case when the state does not seek the death penalty, but instead imposes a term of imprisonment.⁷⁵ In that scenario, in a series of cases dating back to the 1980s, the Court determined whether the penalty is grossly disproportionate.⁷⁶ That requires comparing the gravity of the offense (measured by the harm to society and the culpability of the offender) with the severity of the sentence.⁷⁷ Among other considerations, the Court has also emphasized that the Eighth Amendment does not compel states to adhere to any particular penological theory.⁷⁸ Subsequent cases narrowed *Solem*. But a majority of the Court continues to focus on that basic framework.⁷⁹ Pull back and compare *Coker* and *Ewing*. Understanding those cases requires students to know something about theories of punishment. *Coker* adopts a retributive principle—a state may not execute a rapist; to do so would exceed the eye-for-an-eye principle.⁸⁰ This applies even if the state asserts its need to deter rape by imposing the death penalty.⁸¹ By comparison, *Ewing* allows the state great latitude in choosing sentences based on various penological goals, like deterrence.⁸² The Eighth Amendment works only as a limiting principle if the underlying sentence is so grossly out of line with the underlying crime.

When I teach these cases and the simulation exercise, I underscore that competent counsel had to have some basic understanding of theories of punishment to have engaged the Court in a meaningful discussion of the key legal issue in the case. Because my co-author and I based the simulation exercise

75. Michael Vitiello, *The Expanding Use of Genetic and Psychological Evidence: Finding Coherence in the Criminal Law?*, 14 NEV. L.J. 897, 908–10 (2014).

76. *Solem v. Helm*, 463 U.S. 277, 281 (1983) (holding grossly disproportionate the defendant's life sentence for issuing a "no account" check for \$100, his seventh nonviolent felony conviction); *Harmelin v. Michigan*, 501 U.S. 957, 961, 996 (1991) (upholding defendant's true life sentence for his conviction of possession of over 650 grams of cocaine); *Ewing v. California*, 538 U.S. 11, 30 (2003) (upholding sentence of 25 years to life under California's three strikes law for defendant's felony grand theft conviction for stealing \$1,200 worth of merchandise).

77. *Solem*, 463 U.S. at 290–91; *Harmelin*, 501 U.S. at 1022–23; *Ewing*, 538 U.S. at 22–23.

78. *Solem*, 463 U.S. at 289–90 (“[O]utside the context of capital punishment, successful challenges to the proportionality of particular sentences will be exceedingly rare.” (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980))); *Harmelin*, 501 U.S. at 989–990 (“[T]he character of the sentences imposed by other States for the same crime . . . has no conceivable relevance to the Eighth Amendment.”); *Ewing*, 538 U.S. at 25–26 (“Our traditional deference to legislative policy choice finds a corollary in the principle that the Constitution ‘does not mandate adoption of any one penological theory.’” (quoting *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring))).

79. Vitiello, *The Expanding Use of Genetic and Psychological Evidence: Finding Coherence in the Criminal Law?*, *supra* note 75, at 912.

80. *Coker v. Georgia*, 433 U.S. 584, 620 (Powell, J., dissenting) (criticizing the majority's reasoning. Justice Powell wrote, “As a matter of constitutional principle, that test [whether the punishment imposed is grossly disproportionate to the evil committed by the perpetrator] cannot have the primitive simplicity of ‘life for life, eye for eye, tooth for tooth.’”)

81. *Id.* at 621.

82. *Ewing*, 538 U.S. at 29 (“To give full effect to the State's choice of this legitimate penological goal, our proportionality review of [a defendant's] sentence must take that goal into account.”)

on *Andrade*, I emphasize that practicing attorneys must understand theory in real cases.

III. THE PHILOSOPHY OF PLEADING

You may contend that I was cherry-picking by choosing the previous example. Teaching criminal law without any reference to the purposes of punishment is possible, but deprives students of important insights. In this section, I take up a very different simulation exercise to demonstrate how theory animates civil procedure. To make the case as strongly as possible, this section discusses the federal pleading rule, Federal Rule of Civil Procedure 8(a)(2).⁸³

When I took my first teaching position in 1977, the associate dean told me that, in addition to my preferred courses, Criminal Law and Criminal Procedure, I would be teaching Civil Procedure. Like many of my students, I did not consider Civil Procedure a course where theory would have much importance. Little did I know? Fast-forward several years.

By the 1990s, I had been teaching Civil Procedure for over a decade and had come to recognize the dynamic nature of the material. I also recognized that many students had trouble understanding its dynamism. Often, their eyes glazed over when we discussed topics like minimum contacts, general jurisdiction, or transfer of venue. I committed then to integrating practical skills exercises into the traditional classroom.

More recently, I wrote *Bridge to Practice: Civil Procedure Simulations* as a way to bring the subject to life.⁸⁴ One of the chapters involves federal pleading, for many a topic as dry as it gets.⁸⁵ And yet, as proceduralists understand, the choice of pleading rules demonstrates drafters' important policy preferences. Access to courts and the rule of law are at stake when drafters make those choices.⁸⁶

A short history of pleading demonstrates that point. The writ system was the first major pleading system in the United States.⁸⁷ Under that system, a plaintiff purchased a particular writ—for example, the writ of trespass or the writ of trespass on the case—based on the nature of the plaintiff's claim or claims.⁸⁸ Thus, if a plaintiff wanted to sue the defendant for an act of trespass on land, assault, battery, false imprisonment, or trespass to chattel, the plaintiff selected

83. FED. R. CIV. P. 8(a)(2).

84. VITIELLO & HUGHES, *supra* note 13.

85. *Id.* at 76–85.

86. *See, e.g.*, MICHAEL VITIELLO, *ANIMATING CIVIL PROCEDURE* (2017); *see generally*, SARAH STASZAK, *NO DAY IN COURT* (2015).

87. *See* WILLIAM PROSSER & W. PAGE KEETON, *THE LAW OF TORTS* 30 (W. Page Keeton et al. eds., 5th ed. 1984).

88. *Id.*

the writ of trespass.⁸⁹ A plaintiff could join as many trespass torts as the plaintiff had against the defendant without regard to any transactional relationship among those claims.⁹⁰ But if a plaintiff had a claim that might be based on a theory of trespass or negligence, the plaintiff could not advance both theories in the same case.⁹¹ Thus, imagine a case in which a man makes a pass at a woman who recoils from his attempt and hits her head on a sharp object. Should she seek a writ of trespass because the man's conduct amounted to a battery? Or should she seek the writ of trespass because her injuries resulted from his negligence? Further recognize that choosing the wrong writ will leave the plaintiff without a remedy.⁹²

Beginning in the mid-nineteenth century, most states rejected the writ system for a pleading code based on the Field Code, the product of David Dudley Field's efforts.⁹³ The Field Code modernized pleading, requiring that the plaintiff's complaint include facts sufficient to state a cause of action.⁹⁴ Under Code pleading, fewer cases would turn on technical pleading than under the writ system.⁹⁵ More important was whether a defendant had fair notice of the plaintiff's claim.⁹⁶

Civil Procedure students and practitioners in states that still adhere to Code pleading recognize that the hoped-for simplicity in Code pleading did not always come to fruition.⁹⁷ Most Civil Procedure casebooks include a section on Code pleading.⁹⁸ Often editors include examples from different states where the pleaders included similar allegations.⁹⁹ In one state, for example, a court may characterize the pleader's allegations as legal conclusions, not ultimate facts, and hold that the pleading is improper.¹⁰⁰ Another court might find a similar pleading sufficient.¹⁰¹ Alternatively, a court might hold that a plaintiff alleged evidentiary

89. *Id.*

90. *Id.* at 29.

91. *Id.*

92. *Id.*

93. JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 249–50 (5th ed. 2015).

94. *Id.* at 249 (The plaintiff must include in the complaint “a plain and concise statement of the facts constituting a cause of action without unnecessary repetition. . . .”)

95. *Id.* at 249–50.

96. *Id.*

97. *Id.*

98. *See, e.g.*, STEPHEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN, THOMAS O. MAIN & ALEXANDRA D. LAHAV, CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 302–06 (4th ed. 2012).

99. *See, e.g.*, FRIEDENTHAL ET AL., *supra* note 93, at 254 (“Courts have often not agreed on whether a particular allegation is or is not an ultimate fact.”)

100. *See, e.g.*, *Gillispie v. Goodyear Serv. Stores*, 128 S.E.2d 762, 765 (N.C. 1963).

101. *See, e.g.*, *Robinson v. Bd. of Cnty. Comm’rs*, 278 A.2d 71 (Md. 1971).

facts, not ultimate facts, and dismiss the pleading as insufficient.¹⁰² In some instances, courts have dismissed on such highly technical grounds even when the defendant must be fully aware of the nature of the case against it.¹⁰³ Occasionally, a court has reversed a jury verdict on appeal even though the defendant had full awareness of the nature of the claim and was able to defend at trial.¹⁰⁴ Courts read a party's pleading strictly against that party.¹⁰⁵ Obviously, many cases turned on a litigant's ability to hire a skilled lawyer rather than on the merits of the claim.¹⁰⁶

In the early twentieth century, the then-conservative American Bar Association lobbied for liberalized pleading, in part, because many of its members practiced in business-friendly federal courts.¹⁰⁷ Congress rejected those efforts.¹⁰⁸ During the Depression, however, progressive academic lawyers pushed for the creation of a set of federal rules.¹⁰⁹

Among the primary drafters were men like Charles Clark, the Dean of the Yale Law School and then-federal district court judge.¹¹⁰ Advocates like Clark saw liberalized pleading as instrumental in allowing injured parties ready access to the federal courts.¹¹¹

Federal Rule of Civil Procedure 8(a)(2) demonstrates that policy choice. It provides simply that a pleader must include a short plain statement of the claim that shows that the pleader is entitled to relief.¹¹² Quite intentionally, the drafters did not use the confusing terms "cause of action" and "facts."¹¹³ In addition, the drafters included sample forms as models.¹¹⁴ Rule 84 made explicit that

102. FRIEDENTHAL ET AL., *supra* note 93, at 256 ("[S]ome courts have treated a conclusion of law as a nonexistent allegation."); *see also* RICHARD D. FREER & WENDY COLLINS PERDUE, *CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS* 293–94 (6th ed. 2012).

103. *See, e.g., Gillispie*, 128 S.E.2d at 765 (dismissing a complaint for failure to state a legally cognizable claim even though the pleading specified that the defendants "without cause or just excuse and maliciously . . . trespassed upon the premises occupied by the plaintiff as a residence, and by the use of harsh language and threatening language and physical force directed against the plaintiff assaulted the plaintiff and placed her in great fear.")

104. *See* FRIEDENTHAL ET AL., *supra* note 93, at 256.

105. *See id.* at 253–57.

106. *See id.* at 254 ("Shifting the focus of procedure away from the just resolution of matters on their substantive merits to technical decisions as to the form of statements made in the complaint or answer is the very antithesis of the result desired from pleading reform.")

107. EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 28–31 (2000).

108. *Id.* at 31.

109. *Id.* at 31, 37.

110. *Id.* at 31–32.

111. *Id.*

112. FED. R. CIV. P. 8(a)(2) ("[A] claim for relief must contain: . . . a short and plain statement of the claim showing that the pleader is entitled to relief. . . .")

113. *Cf. id.*

114. FED. R. CIV. P. RULES APPENDIX OF FORMS.

compliance with the forms was sufficient to state a claim.¹¹⁵ The form for stating a negligence claim showed that alleging that the defendant drove his vehicle negligently was sufficient—unlike pleading in Code states where courts found “negligence” to be a legal conclusion.¹¹⁶ Further, case law made clear that courts should read the pleading in the light most favorable to the pleader, not the party who moved to dismiss on grounds that the pleadings failed to state a claim for relief.¹¹⁷

Liberal discovery, also part of the Federal Rules of Civil Procedure, was another policy-driven choice.¹¹⁸ Allowing a plaintiff to avoid dismissal based on fairly minimal pleading gave the plaintiff the opportunity to seek discovery from the defendant.¹¹⁹ Unlike other judicial systems, the Federal Rules allow a party to seek information from his opponents that proves his own case against them.¹²⁰ Read together, liberal pleading and liberal discovery facilitate access to the court system, where the factfinder should decide the case on the merits, rather than on gamesmanship.¹²¹ A system where hyper-technical rules result in cases being dismissed favors parties with the funds to hire the best lawyers, typically large corporate defendants.¹²²

Not surprisingly, business interests and conservative organizations have attempted to unravel this scheme.¹²³ Until the first decade of twenty-first century, the Court largely resisted efforts to alter liberal pleading.¹²⁴ That was the case even when lower courts created rules aimed at heightening pleading in classes of cases, like civil rights cases.¹²⁵ That changed in 2007, when the Court decided *Bell Atl. Corp. v. Twombly*.¹²⁶ There, the plaintiffs brought an antitrust claim action against the Baby Bells and alleged that the Baby Bells conspired not to compete.¹²⁷ The district court granted the defendants’ Rule 12(b)(6) motion, a decision reversed by the court of appeals.¹²⁸ The Supreme Court reversed.¹²⁹

115. FED. R. CIV. P. 84 (repealed 2015) (“The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”).

116. FED. R. CIV. P. FORM 11 (“On [date], at [place], the defendant negligently drove a motor vehicle against the plaintiff.”).

117. See PURCELL, *supra* note 107, at 220–21.

118. CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 580–86 (7th ed. 2011).

119. FRIEDENTHAL ET AL., *supra* note 93, at 380.

120. THOMAS O. MAIN, GLOBAL ISSUES IN CIVIL PROCEDURE 34 (2005).

121. See Justice Larry V. Starcher, *A Judicial Philosophy: People-Oriented Justice*, 111 W. VA. L. REV. 411, 443 (2009).

122. See Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 309 (2002).

123. WRIGHT & KANE, *supra* note 118, at 580–86.

124. *Id.*

125. *Id.*

126. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

127. *Id.* at 550–51. Reading the opinion without reading the complaint might lead the reader to assume that was all that the plaintiffs alleged. In fact, the complaint contained additional allegations in support of the claim of a conspiracy. *Id.* (“[The defendant’s] actions allegedly included making unfair agreements with the

Justice Souter's opinion created a great deal of uncertainty among scholars and lower courts.¹³⁰ Figuring out exactly why the complaint failed was not difficult. He seemed to suggest that the problem with the complaint was that it did not include sufficient facts or evidence tending to prove the pleader's case.¹³¹ He seemed to characterize the allegation of a "conspiracy" as a legal conclusion, which was insufficient.¹³² Instead, a pleader must include "enough factual material (taken as true) to suggest that an agreement was made."¹³³ He also tried to explain that he was not reverting to the Code distinctions between evidentiary facts, ultimate facts, and legal conclusions.¹³⁴ But distinctions that he drew, as well as other statements in the opinion, were hardly convincing.¹³⁵

Some commentators believed that *Twombly* was limited to antitrust cases where the substantive standard required additional proof at trial beyond mere parallel conduct among defendants.¹³⁶ Such a narrow reading proved wrong two years later in *Ashcroft v. Iqbal*.¹³⁷

Iqbal sued, among others, Attorney General Ashcroft and F.B.I. Director Mueller for discriminatory policies put in place after the 9/11 attack in New York.¹³⁸ In affirming dismissal of the claim without an opportunity for discovery, the Supreme Court laid out the blackletter law. Justice Kennedy stated that *Twombly* rested on two underlying principles: first, the policy that "a court must accept as true all of the allegations in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."¹³⁹ A court is "not bound to accept as true a legal conclusion couched as a factual allegation." Second, "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss."¹⁴⁰ Anyone familiar with the history leading to the adoption of the

CLECs for access to ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs' relations with their own customers.")

128. *Id.* at 552–53.

129. *Id.* at 553.

130. FRIEDENTHAL ET AL., *supra* note 93, at 264.

131. VITIELLO, ANIMATING CIVIL PROCEDURE, *supra* note 86.

132. *Twombly*, 550 U.S. at 570.

133. *Id.* at 556.

134. *Id.* at 558.

135. *Id.*

136. See also *Erickson v. Pardus*, 551 U.S. 89 (2007) (using *Conley v. Gibson* language as the pleading standard with no mention of "plausibility").

137. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

138. *Id.* at 662.

139. *Id.* at 678.

140. *Id.* at 679.

Federal Rules must recognize that the Court has rewritten the meaning of Rule 8(a)(2).¹⁴¹

Twombly and *Iqbal* generated extensive debate among academic scholars and confusion and dissent among lower courts.¹⁴² Obviously, something exciting is going on in those cases. I attempted to capture some of that excitement in a simulation chapter in the Bridge to Practice book.¹⁴³

There, the plaintiff was attempting to prevent an internet journalist from publishing an article that she believed would invade her privacy.¹⁴⁴ She is unsure how the journalist gained access to the information about her, but believes that the journalist may have conspired with her fellow employee.¹⁴⁵ Her complaint alleges, among other things, that the defendant and her fellow employee conspired to invade her right to privacy.¹⁴⁶ One way to use the simulation is to have students prepare a memorandum to the judge who must decide whether to grant the motion.

The complaint includes virtually no facts besides the plaintiff's allegation that the defendant conspired.¹⁴⁷ Many students apply the blackletter law quite literally. Thus, consistent with *Iqbal*, students argue that the court should ignore the allegation of a conspiracy because it is a legal conclusion "couched as a factual allegation." Then, with no facts supporting the claim beyond the allegation, students argue that the complaint does not include a plausible claim for relief.

So much more is going on in the simulation than many students recognize. Reframed, good lawyers must do far more than argue a mechanical application of the blackletter law. There is one obvious way for students to distinguish the facts in the simulation from those in *Twombly*. They can compare Justice Souter's discussion of the problems with forcing the defendants to respond to the complaint with the facts of the simulation. Justice Souter noted that part of the problem with the complaint's general allegation of a conspiracy was that the defendants would be forced to examine records over several years to find when any agreement may have taken place.¹⁴⁸ He commented on the enormous cost of that kind of discovery.¹⁴⁹ The simulation involves no similar problem with overly broad discovery requests.

141. Compare FED. R. CIV. P. 8(a)(2) ("[A] claim for relief must contain: . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . ."), with *Iqbal*, 556 U.S. at 662 ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.")

142. FRIENDENTHAL ET AL., *supra* note 93, at 264.

143. VITIELLO, ANIMATING CIVIL PROCEDURE, *supra* note 86, at 76–85.

144. *Id.* at 2.

145. *Id.*

146. *Id.* at 80.

147. *Id.* at 80–83.

148. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007).

149. *Id.*

The previous point involves lawyer-like ability to distinguish cases. It does not, without more, demonstrate how theory advances advocacy. But think more about the simulation hypothetical and the discussion of why the drafters of the rules chose liberal pleading. They favored “the just, speedy, and inexpensive resolution of disputes,”¹⁵⁰ and rejected hyper-technical rules benefiting clever lawyering at the expense of justice. Should a court read *Twombly* and *Iqbal* in a manner that would gut those underlying values? The question is rhetorical.

While that question is rhetorical, it suggests another avenue of discussion about the simulation—whether access to the courts is a good thing. No doubt, most of us support open access to courts with some hesitation. We may be familiar with cases where plaintiffs brought frivolous suits based on little investigation of the underlying factual claims.¹⁵¹ A discussion about access to the courts and its relationship to the rule of law is worth having. Like many members of the public, law students are not likely to appreciate that procedural rules are as important—if not more—in protecting legal rights than substantive law. They are not likely to recognize what many procedural scholars see as a war on procedure whereby the Court has used procedural devices to undercut substantive rights.¹⁵²

As you can see, a discussion of something that seems as mundane as a pleading standard can generate far-ranging inquiry about progressive values, access to courts, the rule of law, and more. Indeed, for those interested in globalizing the curriculum, you might expand the discussion by comparing the Federal Rules approach, the current approach in *Iqbal*, and the approach in European or Latin American courts.¹⁵³ Beyond that, one might use *Twombly* and *Iqbal* as a springboard to discuss whether the Court exceeded its power when it substantially rewrote Rule 8(a)(2).¹⁵⁴

150. FED. R. CIV. P. 1.

151. See, e.g., *Chaplin v. Dupont Advance Fiber Systems*, 303 F. Supp. 2d 766, 771 (E.D. Va. 2004) (finding a claim of workplace racial discrimination “neither factually supported nor supportable” because the plaintiffs failed to allege a that the employer had a racially discriminatory policy and their claimed protected class, Southern Confederate Americans, was multiracial); *Jones v. Int’l Riding Helmets*, 49 F.3d 692, 696 (11th Cir. 1995) (upholding the district court’s award of Rule 11 sanctions to the defendant for factual insufficiency in a products liability action when the plaintiff’s attorney was aware the helmet at issue was made before the defendant company was founded).

152. For a few examples of cases where the Court has made substantive changes through facially procedural holdings, see *Daimler AG v. Bauman*, 134 S. Ct. 746, 764 (2014) (finding personal jurisdiction lacking not on available forum non conveniens or reasonableness grounds, but by expanding *Goodyear Dunlop Tires Operations v. Brown*, 564 U.S. 915, 929 (2011), to find that the defendant corporation here was “too big for general jurisdiction”); *Atl. Marine Constr. Co. v. United States Dist. Court*, 134 S. Ct. 568, 581 (2013) (upholding forum selection clauses on the assumption that they are a “bargained-for” provision in contracts, although in reality that is often a fiction between unequal parties).

153. See, e.g., THOMAS O. MAIN, *GLOBAL ISSUES IN CIVIL PROCEDURE: CASES AND MATERIALS* (2006).

154. See, e.g., Cara Shepley, Ashcroft v. *Iqbal*: How the Supreme Court Rewrote Rule 8 to Immunize High-Level Executive Officials From Post-9/11 Liability (A Plausible Interpretation), 69 MD. L. REV. ENDNOTES 69, 70 (2010) (“[T]he Court engaged in an act of judicial fiat unprecedented in the context of Rule 8.”)

This example is only the tip of the iceberg. Think about other examples from Civil Procedure where attorneys need to know theory to argue effectively. The scope of discovery provides an opportunity to discuss issues surrounding access to the courts, aggressive advocacy on behalf of one's client, an attorney's obligation to the court system, and deciding cases on the merits versus on the basis of clever avoidance, among many other issues.¹⁵⁵ And then there are the Supreme Court's new personal jurisdiction cases and what they reveal about protecting corporations from suit by narrowing available courts in which plaintiffs may sue.¹⁵⁶

IV. CONCLUSION

Imagine being an assistant district attorney arguing before a sentencing judge concerning the appropriate sentence for an offender. You have made your recommendation for a sentence and the judge asks, "Why?" The question invites an answer that demonstrates an appreciation of theory and philosophy.¹⁵⁷ As argued above, penological theory and the philosophy of punishment are imbedded in the law, both in statutes and case law.¹⁵⁸ Teaching skills without teaching theory leaves the criminal lawyer without an important understanding of the law.

Lest one think that example is an outlier, I offered a second example from Civil Procedure.¹⁵⁹ At first blush, one might think that an attorney must only know a few basic rules to draft a complaint or to argue that the pleading is insufficient. And yet, as I have argued, determining the adequacy of pleading may open an inquiry into important values about access to the courts and other values at the core of our legal system.¹⁶⁰

155. See, e.g., Starcher, *supra* note 121, at 443.

156. VITIELLO, ANIMATING CIVIL PROCEDURE, *supra* note 86.

157. *Supra* Part II.

158. *Supra* Part II.

159. *Supra* Part III.

160. *Supra* Part III.

Appendix

In advance of “class,” review the following material and be prepared to discuss the questions indicated below:

1. Attached, you will find a probation report concerning a criminal defendant, Paul Weems. Review that report.
2. You are the law clerk to the judge before whom Weems’ case is pending. A jury has found the Defendant guilty of two counts of theft, but because the Defendant has a prior record, the judge may sentence him under the Three Strikes law. The judge has asked you to recommend an appropriate sentence in this case. Here is information that you need to be aware of:

Defendant qualifies for one or two enhanced sentences under the state’s Three Strikes law. That is so because of his past history. Because the Defendant has previously been found guilty of three felonies under Penal Code, the Defendant is not eligible for probation. Under § 667, the court may “strike” one or more prior convictions, thereby avoiding a 25-year-to-life sentence. If the court does not strike prior felonies, and because the mandatory minimum sentence of 25 years must run consecutively upon two convictions under § 667, the court must impose a minimum term of 50 years. If the court does strike prior felonies, the court may sentence the Defendant under § 487(a) (grand theft) or § 487(b) (petty theft). If the court strikes one or more prior conviction and treats this as felony theft, the court can impose a sentence of from 16 months to 3 years in prison. If the court strikes one or more prior conviction and treats this as misdemeanor theft, the court can impose a sentence of up to six months in jail. As a result, the judge has discretion to sentence the Defendant from a minimum of six months in jail to a maximum of 50 years to life.

In making your recommendation, the judge wants you explain how you justify the sentence. Specifically, be able to explain whether your proposal is justified by reference to any of the various purposes of punishment set out in this state’s penal code. As explained in one case, the sentencing judge must consider several objectives in setting a sentencing: (a) the protection of society; (b) the punishment of the offender; (c) the encouragement of the offender to lead a law-abiding life; (d) the deterrence of other potential offenders; (e) the isolation of the offender so that he cannot commit other crimes; (f) the opportunity for the victim to receive restitution from the offender; and (g) the requirement that the offender receive a sentence similar to those who are similarly-situated. In effect, the state law recognizes the traditional justifications for punishment: retribution, general

deterrence, incapacitation, and rehabilitation or specific deterrence, as well as values of equality.

3. Immediately below, you will find the probation report.

**James Buford
Chief Probation Officer
McGeorge County
State of Pacific**

Court No. YR-01-1978
Weems, Paul A.

I. Present Offenses

The following information is derived from McGeorge City Police Department Report #13-16989.

On December 16, YR-01, Ed Randall, the head of security for the Two Dollar Store, called the police. Officer Lenard Anders responded to the call. Randall led Officer Anders to an interview room where store employees had detained the Defendant. Randall told Officer Anders that the store's security tape recorded the Defendant in an act of shoplifting a number of DVDs and placing them into a backpack. Officer Anders arrested the Defendant and took him to McGeorge City Police Station, where he was booked and released.

On January 3, YR-00, McGeorge City Police Officer Ernest Campbell was off-duty and working for the Two Dollar Store at 20 Miranda Boulevard when he noticed the Defendant in the music aisle of the store. The Officer knew of the Defendant's criminal history and watched him as he slipped several CDs into his pants. The Officer detained him and called the McGeorge City Police Department. Officer Anders made the formal arrest and, because of the Defendant's repeated criminal conduct, he booked the Defendant into jail on felony theft charges. The Defendant was arraigned on felony theft charges on January 4 and released on his own recognizance.

After a jury convicted the Defendant on both counts of felony theft, the Honorable Judge Jay Knox ordered the matter to this office for a sentencing report.

II. Defendant's Statement

During the pre-sentence interview, the Defendant was cooperative. He provided information about his background and current living conditions, including information about his long-standing addiction to heroin. He admitted taking the DVDs and stated that he was going to exchange them for heroin.

III. The Victims

Consistent with Penal Code Sections 192.1 and 192.2, this office provided notice to the victim-businesses. The branch managers of both Two Dollar Stores were contacted via telephone. Neither is requesting restitution because the merchandise was recovered in both cases.

IV. Criminal Record

This office assembled the following information from the Defendant's records at #A1978, FBI Record #56809 and prior probation reports #A4590 and #6670.

Juvenile Convictions

The Defendant had no prior determinations of delinquency when he was a minor. His contact with Pacific Juvenile Services relate to a placement in foster care when he was 8 years old, terminating when he was 12 years old. He was taken from his mother when she was sentenced to a 5-year term of imprisonment for prostitution and distribution of heroin. He was reunited with his mother upon her release.

Adult: Prior Convictions

In YR-13, the Defendant was convicted of a violation of first degree burglary under Penal Code § 460. He was sentenced to 2 years in prison and was released after serving 10 months.

In YR-11, the Defendant was charged with one count of assault on a federal officer in federal court. He contended that he did not know that the officer, working undercover, was a federal officer. He pled guilty to resisting arrest and served a 4-month sentence.

In YR-11, the Defendant was charged with possession of heroin under Health & Safety Code § 11356.1. He pled guilty and was sentenced to probation on the condition that he attend a state-run drug treatment program.

In YR-11, the Defendant was arrested for possession of heroin. His probation was revoked and he was sentenced to 30 days in jail.

In YR-10, the Defendant was convicted a misdemeanor theft under Penal Code § 484 and was sentenced to 14 days in jail and placed on probation for one year.

In YR-10, the Defendant was arrested for multiple counts of attempted first degree burglary under Penal Code § 460. He pled guilty to 3 of those counts and was sentenced 84 months in prison.

In YR-4, the Defendant was paroled from state prison.

In YR-3, the Defendant was arrested for misdemeanor theft in Nevada where he lived briefly. He served 5 days in jail after pleading to that charge.

In YR-2, the Defendant pled guilty to misdemeanor theft under Penal Code § 484 and was sentenced to 60 days in jail.

V. Social History

The Defendant is 38 years old. He was raised by his mother; he does not remember ever having met his father. His mother was a prostitute and drug addict for as long as the Defendant can remember. As noted above, when he was 8 years old, he was made a ward of the state when his mother was incarcerated. Otherwise, his adolescent and early teenage years were unremarkable.

The Defendant graduated from McGeorge High School in YR-20 and joined the US Army. He served in the Gulf War. He was injured in a non-combat accident. During his service in the Gulf War, he began using morphine, first to combat pain, but later illegally. He claims that other soldiers stole medical supplies and sold them to fellow soldiers. He was honorably discharged from the service in YR-15.

Upon his return to civilian life, the Defendant secured a series of low-paid, low-skill jobs, including washing dishes and serving as a car-jockey at a large local dealership. He lost most of his jobs when he was caught stealing from his employers or when he failed to show up on a regular basis. His employers did not bother to pursue criminal charges in exchange for his agreement not to claim unemployment benefits. He admits that his poor job performance was a result of a heroin addiction that has plagued him since his discharge from the Army.

His current crimes were drug related. The Defendant admits that he attempted to steal the DVDs so that he could exchange them for heroin. He commented that since YR-15, he has been drug-free for only a few months at a time, usually after he has entered drug treatment. But long term, he has not been able to stay free from drugs and recognizes that he often does stupid things when he becomes addicted.

The Defendant was married briefly between his discharge from the Army and his first incarceration. His wife divorced him when he was in prison. His family consists of a son he had shortly after he joined the Army. He never married his son's mother and has not stayed in touch with her. The son was born in YR-19 and wants nothing to do with the Defendant.

The Defendant claimed that he has no gang affiliation. There is no evidence to contradict that statement.